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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

NOKIA CORPORATION and	)	C.A. No. 05-16-JJF
NOKIA, INC.	)	
	)	
Plaintiffs,	)	
	)	REDACTED -
v.	)	PUBLIC VERSION
	)	
INTERDIGITAL	)	
COMMUNICATIONS CORPORATION)	)	
and INTERDIGITAL	)	
TECHNOLOGY CORPORATION,	)	
	)	
Defendants.	)	

Friday, March 2, 2007  
10:47 a.m.  
Courtroom 4B

844 King Street  
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.  
United States District Court Judge

APPEARANCES:

MORRIS, NICHOLS, ARSHT & TUNNELL  
BY: JACK B. BLUMENFELD, ESQ.

-and-

ALSTON & BIRD, LLP  
BY: PATRICK J. FLINN, ESQ.  
BY: RANDALL ALLEN, ESQ.

Counsel for Plaintiffs

1 APPEARANCES CONTINUED:

2

3 POTTER, ANDERSON & CORROON  
4 BY: RICHARD HORWITZ, ESQ.

5

-and-

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7 FULBRIGHT & JAWORSKI, LLP  
8 BY: LINDA L. ADDISON, ESQ.  
9 BY: CLAY ROGERS, ESQ.

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Counsel for the Defendants

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13 Also Present:

14 Mr. Andrew G. Isztwan, Sr. Director  
15 InterDigital

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1 THE COURT: Next will be Nokia  
2 versus InterDigital.

3 All right. You want to announce  
4 your appearances?

5 MR. BLUMENFELD: Good morning, Your  
6 Honor. Jack Blumenfeld, again, for Nokia, along  
7 with Randall Allen and Patrick Flinn from  
8 Alston & Bird in Atlanta.

9 THE COURT: Good morning. Welcome.

10 MR. HORWITZ: Good morning, Your  
11 Honor. Rich Horwitz from Potter, Anderson for  
12 InterDigital. With me today from Fulbright &  
13 Jaworski are Linda Addison, Buddy Rogers, and  
14 then Andy Isztwan from InterDigital, in-house  
15 counsel.

16 THE COURT: Good morning and  
17 welcome. All right.

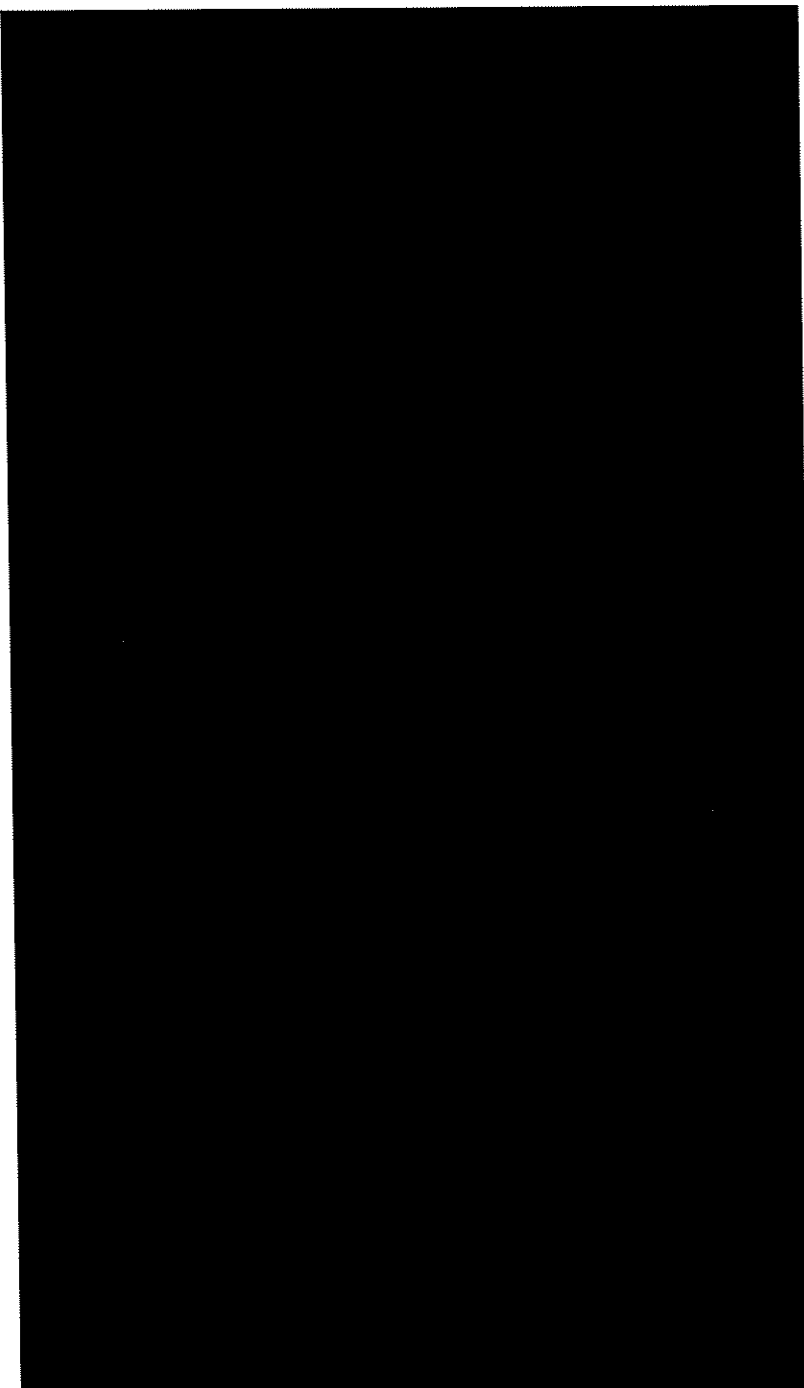
18 Let's hear from InterDigital.

19 MS. ADDISON: May it please the  
20 Court, opposing counsel, Your Honor, InterDigital  
21 is here today making a serious charge, and it is  
22 not one that we make lightly. I will tell the  
23 Court as someone who's been admitted pro hac vice  
24 in this court, I have been practicing law, it

1 will be 31 years this coming October. And this  
2 is the first time I have prosecuted a motion for  
3 spoliation. We take this very seriously.

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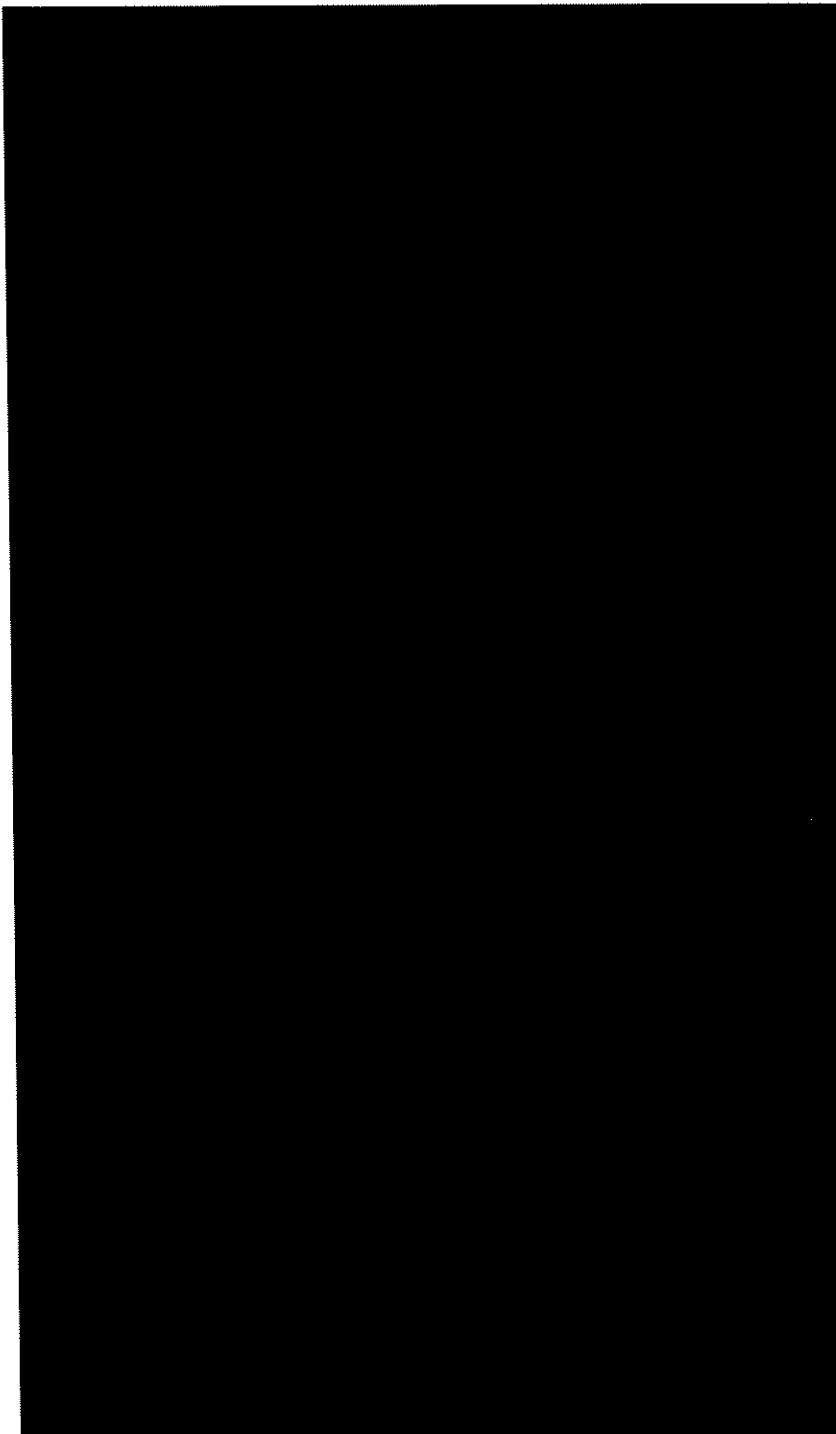
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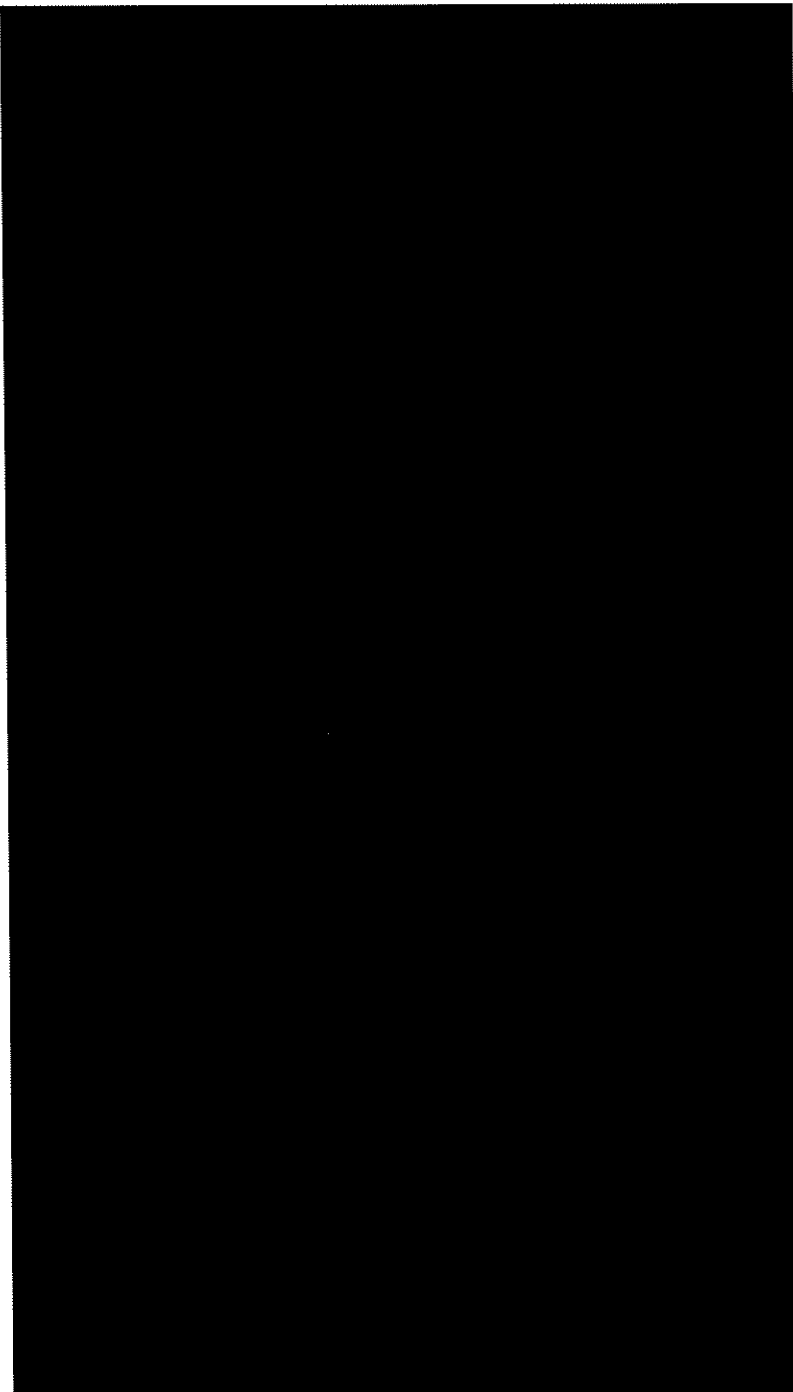
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1 think people lie under oath on witness stands?  
2 And we tell them, you know, you have to decide  
3 whether it's an intentional falsehood, an  
4 innocent mistake or a lapse of memory, that kind  
5 of thing.

6 How do I know that it's as bad and  
7 intended conduct as this kind of motion would  
8 require?

9 MS. ADDISON: That's a very fair  
10 question, Your Honor, and I would very much like  
11 to respond in two ways. One on the facts and one  
12 on the law.

13 Assuming that the Court will  
14 entertain a little bit more argument, I would  
15 like an opportunity to lay out for the Court,  
16 because this case is not simply -- this motion is  
17 not simply about Mr. Muir. This motion is about  
18 Nokia's failure to preserve documents that are  
19 foreseeably discoverable and were foreseeably  
20 discoverable.

21 There were two document retention  
22 policies in place by Nokia that governed this  
23 conduct policy. Nokia's own document retention  
24 procedure changed in June of '05. The earlier

1 policy is attached to our opening brief. The  
2 subsequent policy currently in effect is attached  
3 to our reply brief.

4 There is no way that a reasonable  
5 person reading either of those document retention  
6 policies could conclude, that absent a litigation  
7 hold, reasonably foreseeable documents, documents  
8 that would be reasonably discoverable and  
9 foreseeable as such would have been preserved.  
10 It absolutely cannot and would not happen under  
11 either of those Nokia litigation policy retention  
12 policies. It would not have been preserved.

13 It would not have been preserved  
14 absent a litigation hold. I would be happy, if  
15 the Court will indulge us, to walk the Court  
16 through those policies, if the Court thinks that  
17 would be useful.

18 Secondly, Your Honor, with regard to  
19 the questions the Court has asked about  
20 culpability, and willfulness, and knowing  
21 conduct, I would respectfully submit that there  
22 are -- as the Court knows, there are not a lot of  
23 post Zubalik opinions. One of those is Your  
24 Honor's case of Daimler Chrysler, which came a

1 mere 30 days after Zubalik and didn't reference  
2 Zubalik.

3 This is another case that, we  
4 believe, Your Honor, is completely dispositive  
5 here. It's the Mosaid case, Mosaid versus  
6 Samsung. M-O-S-A-I-D. It is cited in our brief.

7 That case is very close to being on  
8 all fours in this case. That case is out of New  
9 Jersey. It's Judge Martini, so it's a District  
10 Court in this same circuit.

11 And that Court has found that for an  
12 adverse inference, the Courts in this circuit do  
13 not require and do not impose a culpability  
14 decree. There's a difference, Your Honor, as I  
15 know the Court knows from Daimler and many other  
16 cases over which the Court has presided.

17 There are two different tests when  
18 one is looking at a death-penalty-type sanction  
19 dismissal. As the Court decided in Daimler or  
20 strike pleadings, or things like that then, there  
21 are three prongs. And fault and culpability  
22 fault is -- certainly is the first of those three  
23 prongs.

24 When the Court is looking at a

1 death-penalty-type sanction or a sanction such as  
2 dismissal, even preclusion of evidence, when a  
3 Court is looking at an adverse inference.

4 However, in this circuit under the Mosaid case,  
5 culpability is not -- is absolutely not a factor.  
6 There are four factors. One is: Did the party  
7 control the documents?

8 Secondly, was there suppression of  
9 the evidence?

10 Thirdly, were the documents  
11 relevant?

12 And fourthly, were they foreseeably  
13 discoverable?

14 Those are the four prongs of a test  
15 for an adverse inference, and culpability is not  
16 one of them.

17 THE COURT: See, well, again, I'm  
18 not a good communicator, but my questions went to  
19 the second and third elements.

20 And whether you call it culpability  
21 or suppression, and -- well, let me hear from the  
22 other side.

23 MS. ADDISON: If I could just  
24 respond to that last point, Your Honor.

1 THE COURT: Sure.

2 MS. ADDISON: I would really like to  
3 reiterate this. There is no way under the Nokia  
4 document retention policy, the old one, the new  
5 one that these documents would have been  
6 preserved absent a litigation hold. And  
7 curiously absent from Nokia's papers is a  
8 response to why they didn't place a litigation  
9 hold.

10 And I understand what is troubling  
11 the Court. I think that that speaks highly of  
12 the Court that the Court would be concerned about  
13 that.

14 But it is astonishing that under  
15 that, Nokia did not place the litigation hold  
16 until it did and that the document retention  
17 policy, the earlier policy even favors holding  
18 documents for a minimal amount of time.

19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 [REDACTED] And I would respectfully submit,  
24 Your Honor, that that document retention policy

1 coupled with the absence of a litigation hold  
2 should hopefully be sufficient to be persuasive  
3 with the Court on two and three.

4 Thank you.

5 THE COURT: All right. Thank you.

6 Mr. Blumenfeld.

7 MR. BLUMENFELD: Thank you, Your  
8 Honor. Ms. Addison started out by talking about  
9 serious charges and drastic remedies, and she  
10 finished up a little by talking about  
11 death-penalty-type remedies.

12 The way I read their brief, what  
13 they've asked Your Honor to do is exclude Nokia  
14 from putting in any evidence, documents or  
15 testimony about the licensing activities. That  
16 is a death-penalty-type remedy. That's what  
17 they've asked for.

18 They've also asked for the adverse  
19 inference. They mentioned the Mosaid case from  
20 New Jersey. Nothing at all like this case.

21 The Mosaid case is a patent case  
22 where there was not a single technical Email that  
23 had been produced. And there was a record that  
24 they had been destroyed during the course of

1 litigation, notwithstanding that they had been  
2 requested in document requests. Nothing at all  
3 like this case.

4 I'll get to that in a minute.

5 But there is no requirement and they  
6 concede this, there's no requirement that every  
7 scrap of paper and every email that a company has  
8 be preserved in litigation. What the cases say  
9 is that relevant unique documents have to be  
10 retained.

11 What the cases also say is that  
12 InterDigital has the duty, the burden to  
13 demonstrate that there was evidence destroyed  
14 that contained relevant information. That's what  
15 the cases say. Your decision in Tracinda or  
16 Daimler Chrysler says their burden is to show "a  
17 reasonable probability based on concrete evidence  
18 rather than a fertile imagination that access to  
19 the lost material would have produced evidence  
20 favorable to the case." That's what the law is.

21 Now, Your Honor asked at the  
22 beginning of Ms. Addison's argument, How would I  
23 know that relevant documents were destroyed? And  
24 you wouldn't know.

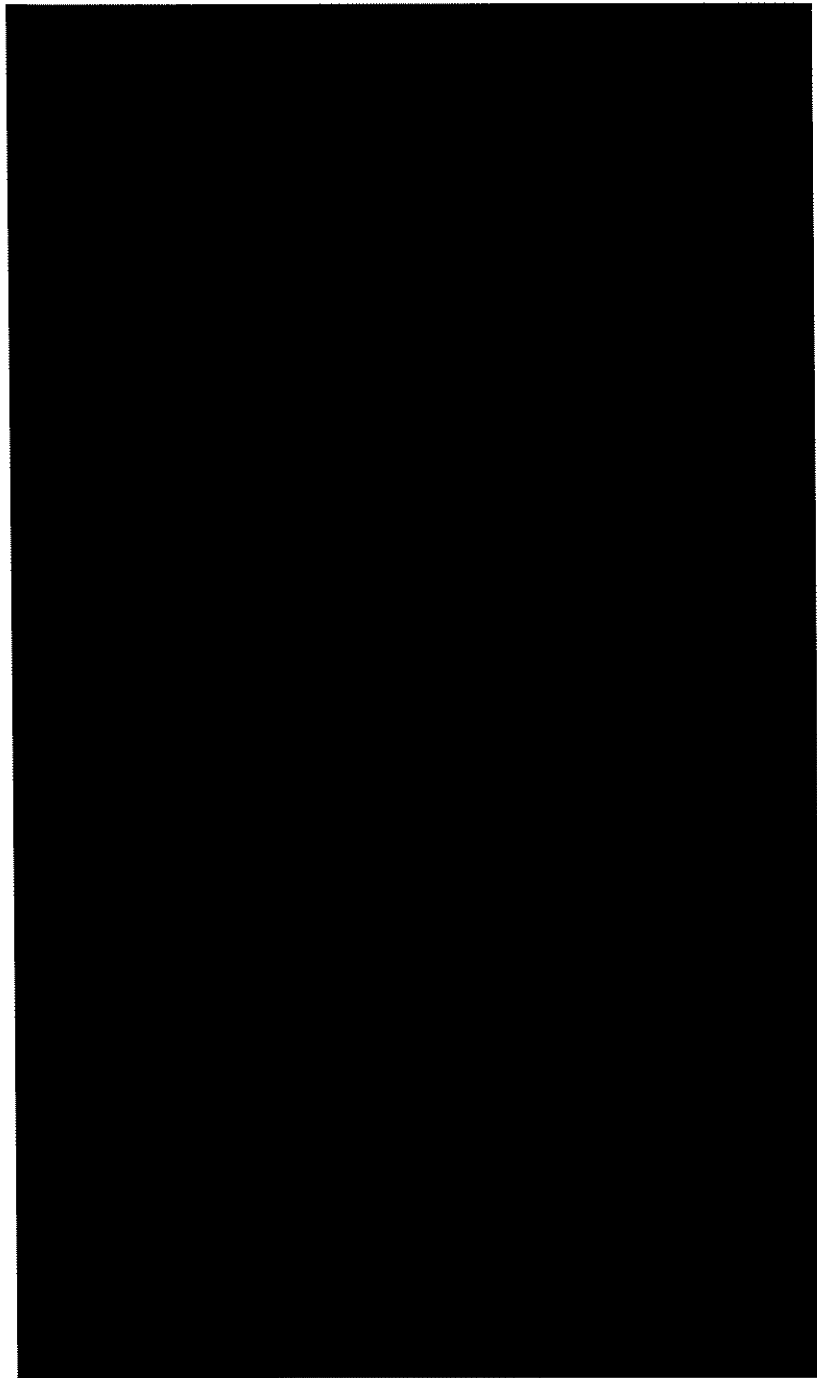
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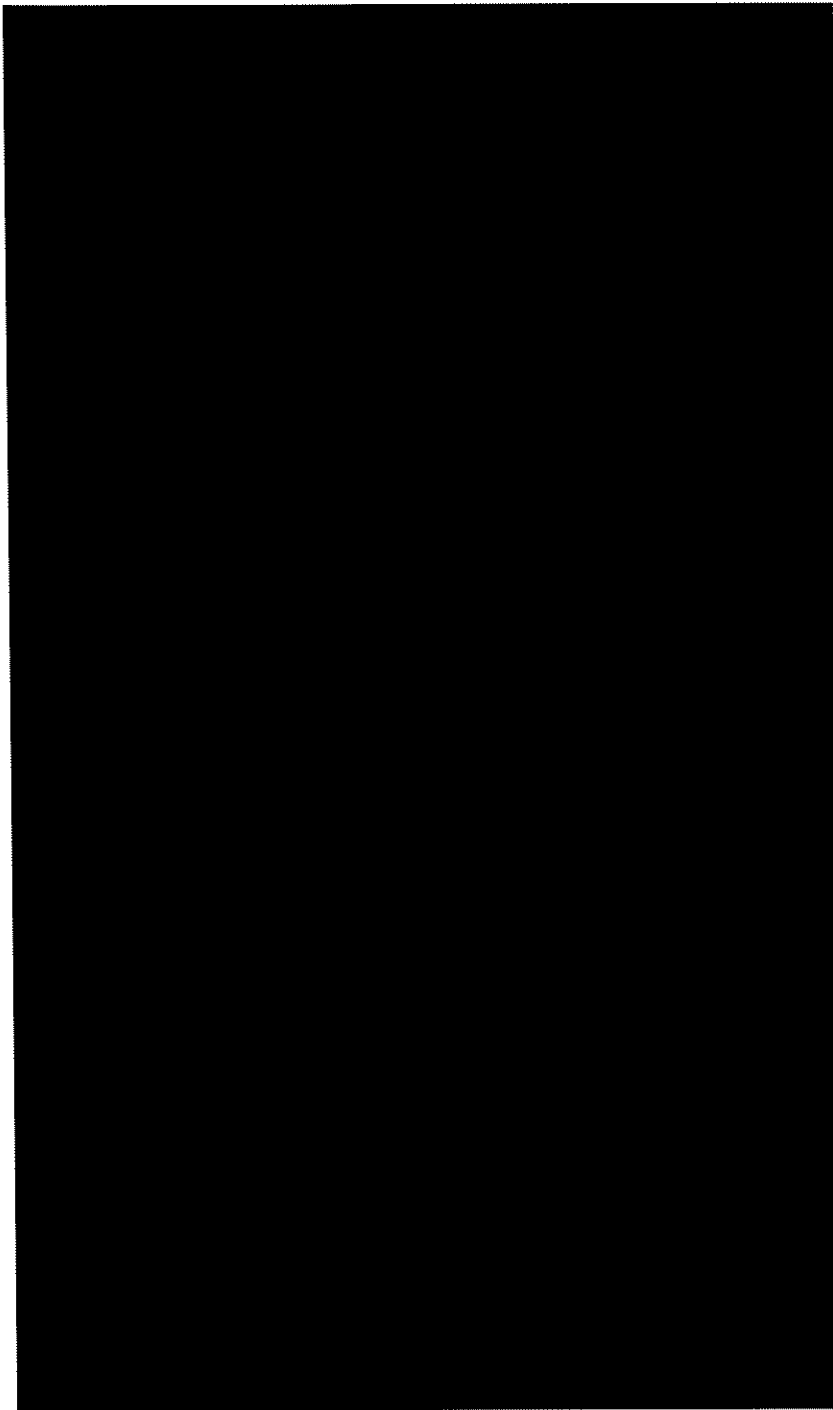




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1 And if you look at it, you're going to see that  
2 in the columns, that's a U.S. policy. They  
3 have -- Mr. Muir is in the U.K.

4 But that there's a column that has  
5 all kinds of different codes in there. One of  
6 them is a P, which means permanent. And there  
7 are a lot of P's there.

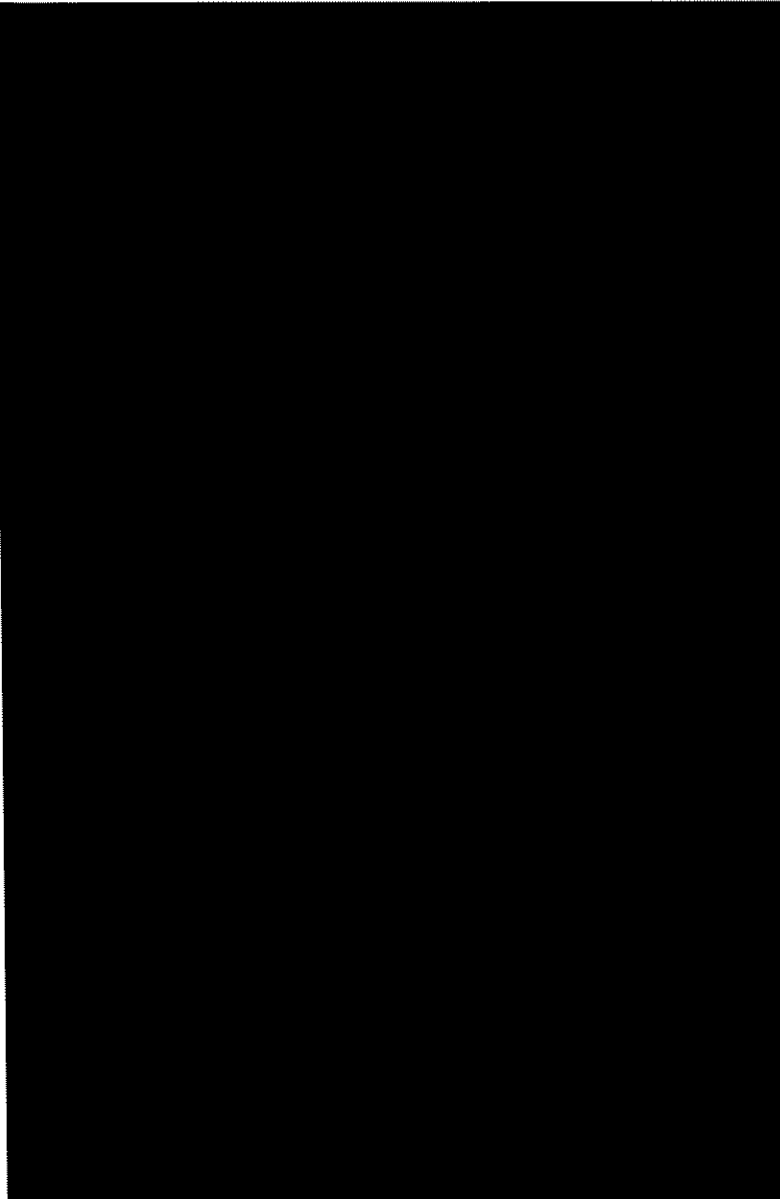
8 Even if you look at the document  
9 retention policy, they've made absolutely no  
10 showing that anything that's relevant to this  
11 case has been destroyed. Now, I haven't been  
12 through a lot of spoliation motions. I've been  
13 through one that I can think of.

14 But typically what happens in  
15 spoliation motions, at least in the experience  
16 that I do have, is that someone comes in and  
17 says, Your Honor, look at this. There's this  
18 crucial document that's missing or it's sets of  
19 crucial documents that's missing. You know,  
20 where did they go? When did they get destroyed?  
21 How did this happen? We need those documents.

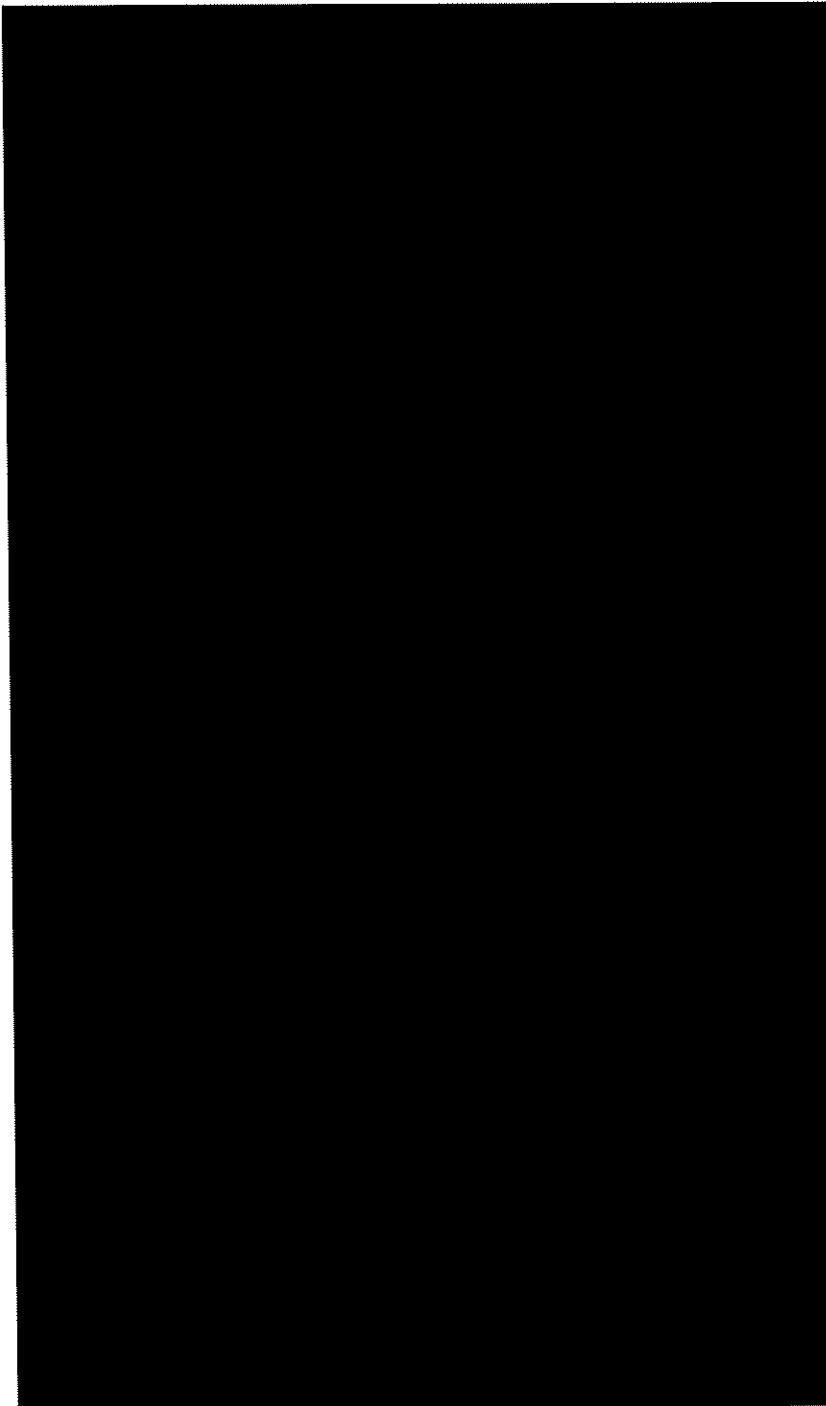
22 You won't see a word anything like  
23 that in any of their papers. And you won't hear  
24 it from Ms. Addison, because they have no

1 evidence of anything that's relevant to this  
2 case, and that they don't have that has been  
3 destroyed.

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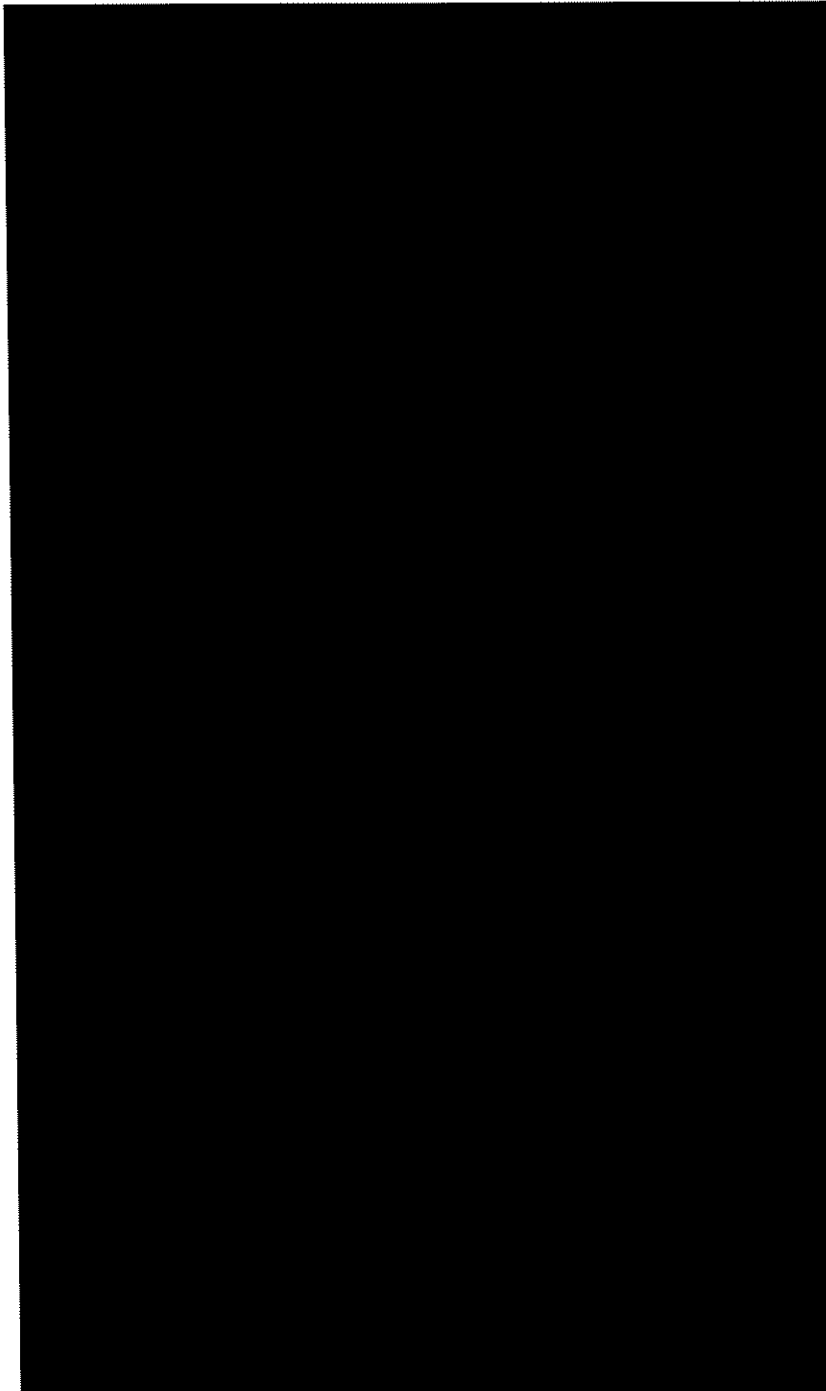
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4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7           With all due respect, I believe that  
8 Mr. Blumenfeld misspoke, because to say that we  
9 didn't attempt to tie the destruction of  
10 documents to this case is far from the truth.  
11 This was a witness who repeatedly said, I don't  
12 know. I'd have to look it up. I'd have to do  
13 further investigation about virtually every  
14 single factual question that he was asked.

15           So I respectfully submit, Your  
16 Honor, that what confronts the Court is a party  
17 that has failed to give a litigation hold. It's  
18 basic litigation 101 ever since Zubulake, if not  
19 before.

20           Every party in this country knows  
21 you've got to preserve these documents. Even as  
22 Mr. Blumenfeld sits down, we still don't have any  
23 words from Nokia about why that didn't happen  
24 here.

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1 offered by both sides on the application is  
2 equally balanced and I could be persuaded based  
3 on both the quality and quantity of the evidence  
4 on both sides to rule either to grant or deny the  
5 motion. And since in my view and findings, the  
6 evidence is in equal balance, I can't grant the  
7 motion. So I'm going to deny the motion.

8 Certainly, if InterDigital develops  
9 further evidence that supports the present  
10 application, they're at liberty to refile, and  
11 we'll consider it again.

12 But on the record here I'm going to  
13 deny the motion.

14 All right. Thank you.

15 (Hearing before Judge Farnan was  
16 concluded at 11:08 a.m.)

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1 State of Delaware )  
2 New Castle County )

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5 CERTIFICATE OF REPORTER

6

7 I, Heather M. Triozzi, Registered  
8 Professional Reporter, Certified Shorthand  
9 Reporter, and Notary Public, do hereby certify  
10 that the foregoing record, Pages 1 to 25  
11 inclusive, is a true and accurate transcript of  
12 my stenographic notes taken on March 2, 2007, in  
13 the above-captioned matter.

14

15 IN WITNESS WHEREOF, I have hereunto  
16 set my hand and seal this 5th day of March, 2007,  
17 at Wilmington.

18

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20

21 Heather M. Triozzi, RPR, CSR

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